

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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In the Matter of )  
Implementation of Section 621(a)(1) of )  
the Cable Communications Policy Act of 1984 ) MB Docket  
No. 05-311  
as amended by the Cable Television Consumer )  
Protection and Competition Act of 1992 )

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**COMMENTS OF THE CENTER FOR DIGITAL DEMOCRACY**

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We welcome this opportunity to comment on the commission's proposed implementation of Section 621(a)(1) of the Communications Act of 1934, as amended, *not* because we believe that there are a significant number of instances of local franchising authorities "... unreasonably refus[ing] to award an additional competitive [video] franchise," but rather because of the larger issues that the proposed rulemaking raises. These issues include **local authority, localism, broadband deployment, network neutrality, and community media**, all of which must be included, we are convinced, within the scope of the commission's present inquiry. In addition, the FCC must also pay attention to history, especially its own. The commission's own substantial hearings on cable TV policy during the 1970's made it clear that community communications services—whether delivered by a Verizon,

AT&T, Bell South, Comcast or a Time Warner—require local oversight and governance.

First, concerning **local authority**, we wholeheartedly concur with Commissioner Michael J. Copps, who, in his statement accompanying the commission's release of this NPRM, underscored the importance of community participation in the video franchising process:

The Communications Act provided a process for entry into the video services marketplace under which cable operators must secure franchises. This process recognizes the important role that franchising authorities play—ensuring public health, safety and welfare; preventing economic red-lining; managing public rights-of-way; and ensuring access for public, educational and governmental channels.<sup>1</sup>

More specifically, a typical cable franchise includes a number of important elements, each of them *tailored to the particular needs of a given community*:

- capacity, facilities, and equipment for public-, education-, and government-access (PEG) channels;
- support for the construction, maintenance, and operation of PEG facilities;
- high-speed institutional networks (I-Nets), offering voice, video, and data service to local agencies and institutions (including schools and libraries);
- customer service guarantees, and discounted rates for seniors, the economically disadvantaged, and the disabled;
- public safety requirements (ensuring that connections to the home are electrically grounded, for example);
- coordinated use of rights of way (managing construction schedules to minimize the disruption of traffic, for example);
- consumer protections (establishing refund procedures and ensuring clarity in billing, for example);
- environmental protections (assessing the impact of cable system construction and rebuilds, for example);

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<sup>1</sup> "Statement of Michael J. Copps, MB Docket No. 05-311 (released 18 Nov. 2005), 23.

- local economic development (meeting the needs of area businesses for advanced telecommunications);
- diversity of viewpoints and programming (establishing guidelines for the categories of programming to be included in the cable line-up, such as foreign-language shows);
- responsiveness to future technological developments (incorporating provisions to ensure the adoption of new cable technologies);
- interconnections with neighboring cable systems;
- emergency alert and override mechanisms;
- insurance and bonding requirements; and
- enforcement mechanisms, to ensure the fulfillment of these and all other contractual obligations covered by the franchise agreement.

Cable franchises, moreover, are uniquely *public* arrangements, a rare example of negotiations with the corporate sector in which community members can participate, through needs assessment surveys and public hearings, the results of which redound to the benefit of the community as a whole. The needs assessment process, in which the *future* cable-related needs of residents are ascertained, is one of the tools that cities use as leverage in negotiating franchise renewals with often-recalcitrant cable operators.<sup>2</sup> As James N. Horwood of Spiegel & McDiarmid explains, "The ascertainment process during renewal is ... critical to establishing the appropriate level of PEG access in a community."<sup>3</sup>

The advanced networks that cable operators and now telephone companies are bringing to our communities, clearly, are more than mere entertainment systems. As the Baller Herbst Law Group has pointed out, "Cable systems are no longer simply vehicles for delivering cable television to households but have become highly

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<sup>2</sup> Examples of successful needs assessment reports include those of Washington, DC ([http://octt.dc.gov/information/legal\\_docs/doc\\_viewer.asp?document=INPUT\\_2002\\_02\\_05\\_LIN\\_KS.pdf](http://octt.dc.gov/information/legal_docs/doc_viewer.asp?document=INPUT_2002_02_05_LIN_KS.pdf)), Los Angeles ([http://www.lacity.org/ita/STAFF\\_REPORT\\_FINAL\\_12\\_24\\_03.pdf](http://www.lacity.org/ita/STAFF_REPORT_FINAL_12_24_03.pdf)), and Davis, Calif. (<http://www.ci.davis.ca.us/pcs/telecomm/pdfs/20031208-needs-complete.pdf>).

<sup>3</sup> James Horwood, "Cable Franchise Renewal and Local Right of Way Management," <http://library.lp.findlaw.com/articles/file/00430/001320/title/Subject/topi>. More generally, needs assessments efforts are one way that communities can begin organizing for the kinds of noncommercial programming operations that will need sustained support (drawing on a portion of the 5 percent franchise fee that cable operators are obliged to pay) once the franchise agreement has been signed.

sophisticated broadband platforms capable of providing voice, video, high-speed data and other interactive services to all addresses in a community. Cable systems can therefore contribute significantly to economic development, educational opportunity and quality of life in the electronic era."<sup>4</sup>

It is in this context, then, that the commission asks "...whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem." The issue of "**accelerated broadband deployment**," however, should not obscure the equally important need to "accelerate" the broadband networks themselves, and to ensure that they serve their communities. For the commission to ignore the needs of citizens in towns and counties across the country, who deserve to benefit in the fullest context from accelerated deployment, would make a mockery of one of the key goals of the commission—to ensure **localism** in U.S. communications. Localism has been a bedrock principle governing communications policy. The commission must preserve what is one of the last vestiges of ensuring local electronic media services—the multi-channel video franchise.

The commission must also re-read its own extensive record on cable television, especially the hearings held in the early 1970's. It will become clear that the commission heard abundant testimony concerning the need for a robust system promoting "community expression."<sup>5</sup> We strongly believe that the importance of ensuring local programming and meeting information-related needs is just as vital today (indeed, perhaps even more vital, in light of such issues as population diversity and national security).

Meanwhile, the US not only lags behind at least 11 other countries in terms of the per capita use of broadband connections, it fares even worse in head-to-head comparisons of the speed and cost of that service.<sup>6</sup> Residents of South Korea and France, for example, enjoy broadband speeds some 10 to 20 times

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<sup>4</sup> Baller Herbst, "Key Issues in Cable Franchise Renewals," <http://www.baller.com/pdfs/renewal-issues.pdf>.

<sup>5</sup> Laura R. Linder, *Public Access Television* (Westport, Ct.: Praeger Publishers, 1999), 1-20; and Ted Ledbetter, "An Overview of Cable Television," in Charles Tate, ed., *Cable Television in the Cities: Community Control, Public Access and Minority Ownership* (Washington, DC: Urban Institute, 1972).

<sup>6</sup> Organisation for Economic Co-operation and Development, "OECD Broadband Statistics, June 2005," [http://www.oecd.org/document/16/0,2340,en\\_2649\\_37415\\_35526608\\_1\\_1\\_1\\_37415,00.html](http://www.oecd.org/document/16/0,2340,en_2649_37415_35526608_1_1_1_37415,00.html).

faster than average US connections, while on a per-megabit basis US consumers pay 10 to 25 times more than broadband users in Japan.<sup>7</sup>

But even though we must encourage the deployment of broadband networks sufficiently robust to accommodate the full range of rich-media traffic that is already starting to appear online (and which is likely to expand rapidly once residential transmission rates increase), we must not blindly encourage data throughput at the cost of permitting the complete privatization of the last-mile connections to the home. In terms of Internet traffic, at least, an essential *public* element must be retained, in the form of **network neutrality** or principles of nondiscrimination, lest network operators become Internet gatekeepers—arbiters of the Internet content that flows into our homes (or the relative speed at which "affiliated" versus "unaffiliated" content traverses those last-mile connections). As we have noted elsewhere,

The nation's largest telephone and cable companies are crafting an alarming set of strategies that would transform the free, open and nondiscriminatory Internet of today to a privately run and branded service that would charge a fee for virtually everything we do online.... Under the plans they are considering, all of us—from content providers to individual users—would pay more to surf online, stream videos or even send e-mail.<sup>8</sup>

The subject of Senate Commerce Committee hearings on 7 February 2006 and extensively covered in the mainstream press, the principle of network neutrality must inform any decision that the FCC makes concerning broadband deployment. As USC's Francois Bar and his colleagues observed as early as 2002, we face the prospect of “an electronic marketplace which systematically favors the providers of content, services or transactions who have a privileged financial relationship with the monopoly owner of the underlying infrastructure.... The infrastructure owner will have strong incentives to configure its network to give superior performance to the preferred ISP [Internet service provider] and superior service to the ISP's favored partners.”<sup>9</sup>

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<sup>7</sup> S. Derek Turner, "Broadband Reality Check: The FCC ignores America's Digital Divide," Free Press, Aug. 2005, [http://www.freepress.net/docs/broadband\\_report.pdf](http://www.freepress.net/docs/broadband_report.pdf).

<sup>8</sup> Jeff Chester, "The End of the Internet?" *The Nation*, 1 Feb. 2006, <http://www.thenation.com/doc/20060213/chester>.

<sup>9</sup> Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong Michael Kleeman, and John Zysman, "Cable Access as a Case Study for the Next Generation Internet," in L.W. McKnight and J. Wroclawski, eds., *The Economics of Quality of Service in Networked Markets*, (Cambridge: MIT Press, 2004).

Viewed in this perspective, the FCC's concern over the potential of "unreasonable refusals" by LFAs limiting the *quantity* of broadband networks must be balanced by an equal concern over the *quality* of those networks—the extent, that is, they adhere to the principles of openness and diversity that have long governed the public Internet.

Nevertheless, as the commission's 3 November 2005 NPRM notes, "Congress provided that '[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635....' Section 635, in turn, states that '[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) ... may commence an action within 120 days after receiving notice of such determination' in federal court or a state court of general jurisdiction."<sup>10</sup>

It has been well over a decade since Congress added that language concerning the right of aggrieved parties to appeal the decision of local franchise authorities to deny a competitive video franchise, and it should thus be a relatively simple matter to tally the number of such appeals. That figure might be compared, in turn, to the number of LFA's who have effectively been "held hostage" by cable companies that have prolonged franchise transfer and renewal proceedings, either by failing to negotiate in good faith (preferring to operate under an extension of the existing franchise instead, even if that means initiating legal action against the LFA, as Comcast did in San Jose) and/or by refusing to live up to the terms and conditions previously negotiated by their predecessor (as Comcast repeatedly did following its acquisition of AT&T Broadband).<sup>11</sup>

Instances of "unreasonable LFAs," in short, must be measured against examples of "corporate intransigence" in order to get an accurate reflection of the market-driven climate in which franchise negotiations currently take place. Frankly, we have no reason to doubt the recent declaration by four local government associations that "[t]he elected leaders of our nation's cities and counties stand ready and willing to welcome video competition in their

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<sup>10</sup> MB Docket No. 05-311 (released 18 Nov. 2005), 4.

<sup>11</sup> Andrea Figler, "Cities Anxious Over Comcast's San Jose Suit," *CableWorld*, 15 Sept. 2003, [http://www.cableworld.com/cgi/cw/show\\_mag.cgi?pub=cw&mon=091503&file=cities\\_anxious\\_comcasts.inc](http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=091503&file=cities_anxious_comcasts.inc); Mark Linder, "Comcast's Lack of Good Faith is Disappointing," *Silicon Valley/San Jose Business Journal*, 8 Nov. 2004, <http://www.bizjournals.com/sanjose/stories/2004/11/08/editorial3.html>; Beth Curda, "Davis Nixes Comcast's 'Best Offer,'" *Davis Enterprise*, 8 July 2004, <http://www.davisenterprise.com/articles/2004/07/08/news/177new0.txt>.

communities."<sup>12</sup> We are equally persuaded by the recent testimony of Marilyn Praisner, councilmember from Montgomery County, Maryland, before the House Energy and Commerce Committee:

Much like you, local governments have been gravely disappointed with the telephone industry's past promises-made versus reality-delivered. Three times before, in 1984, 1992, 1996, the telephone industry promised Congress it would enter the video services business. Each time Congress amended the laws to permit the entry. Now they ask again. While local government will never agree that the local franchise process has impeded video competition, we are prepared to explore different means of streamlining the process.<sup>13</sup>

Now that literally tens of thousands of cable franchises have been successfully negotiated by more than 30,000 LFAs across the country over the years, we would have to say that the prospects for such streamlining are favorable indeed.

## Conclusion

Cable franchise agreements, clearly, are unique social pacts. More than merely a license for companies to dispense multi-channel video and other services, these documents are crafted with specific community needs and interests in mind. As such, these agreements also contain the building blocks for a genuine **community media** movement, one that places the power of broadcast and digital technologies in the hands of individuals and nonprofit organizations normally excluded from the market-driven mainstream media.<sup>14</sup>

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<sup>12</sup> National League of Cities, United States Conference of Mayors, National Association of Counties, National Association of Telecommunications Officers and Advisers, "Local Government: Partner in Promoting Video Competition," n.d. [2005], [http://www.usmayors.org/uscm/wash\\_update/documents/jrBefore%20Congress%20Rewrites%20Telecom%20Act.pdf](http://www.usmayors.org/uscm/wash_update/documents/jrBefore%20Congress%20Rewrites%20Telecom%20Act.pdf).

<sup>13</sup> "The Case for Fair Competition. Testimony of the Honorable Marilyn Praisner on behalf of National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, National Association of Counties, and TeleCommUnity," November 9, 2005, [http://www.usmayors.org/uscm/wash\\_update/documents/jrCommunications%20Staff%20Draft%20%20Local%20Full%20Text%20111005.pdf](http://www.usmayors.org/uscm/wash_update/documents/jrCommunications%20Staff%20Draft%20%20Local%20Full%20Text%20111005.pdf).

<sup>14</sup> For examples of such community media organizations in operation, see the Grand Rapids Community Media Center (<http://www.grcmc.org/>), Boston's Commonwealth Broadband Collaborative (<http://www.cbcmedia.net/>), Blacksburg Electronic Village (<http://www.bev.net/>), and Seattle's Reclaim the Media (<http://www.reclaimthemedias.org/>).

Failure to ensure meaningful local governance in multi-channel broadband networks will seriously deprive the public of the ability to benefit from advanced communications. It will set back the commission's own goal of promoting localism, reduce diverse sources of programming, and remove one of the last democratically oriented principles of electronic media governance.

Respectfully submitted,

/s/ Jeffrey Chester

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